

## INTERNATIONAL ADR IN THE 1990's: THE TOP TEN DEVELOPMENTS

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### I. INTRODUCTION

When asked what organized labor wanted, Samuel Gompers, the first President of the American Federation of Labor, famously offered a one word answer: “more!”<sup>1</sup> There is no better short

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1. *Urging them to Stand Firm*, CHI. INTER OCEAN, Apr. 23, 1890, *reprinted in* 2 THE SAMUEL GOMPERS PAPERS at 302-03 (Stuart B. Kaufman ed. 1987) (“When I am asked if this eight-hour movement is my alpha and omega of the labor problem I simply answer, we want more, and when we get it we shall want more, and when we get that we

answer to what has happened in the area of international alternative dispute resolution ("ADR") during the most recent decade. The goal of this article is to demonstrate the accuracy of this statement.

The traditional approach to Top 10 lists, at least as that art form has been raised to new heights by David Letterman, is to begin with the least important item and move to the most important one.<sup>2</sup> We have retained the more conventional numbering system, but little significance should be read into the ordering of the developments discussed below. It is difficult enough to construct a top ten list, let alone to rank order the selected items.

That our topic is ADR rather than just arbitration is itself noteworthy. Indeed, the debut of mediation at center stage in the international arena is arguably the most striking ADR development of the last decade.<sup>3</sup> The difficulty in discussing international mediation is that it lacks the case law or doctrinal "hooks" on which to hang a discussion; in this respect, the arbitration topics are far easier to address. We examine nine arbitration topics, and close with a consideration of international mediation.

Our examination of international ADR is presented from an American perspective. This is not evidence of parochialism, but instead reflects the fact that national legal norms are a major determinant in the applicable legal principles and practice used in the international arena. The New York Convention on the Recognition and Enforcement of Arbitration Awards ("New York Convention"), now adopted in over 120 countries,<sup>4</sup> explicitly provides a major role for the substantive and procedural law of the country where a party seeks to obtain an order for arbitration or the recognition of an arbitration award.<sup>5</sup> The same principle is

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shall want more . . . . We want more, and if I read the signs of the times rightly we are going to get more.").

2. See, e.g., Top Ten Signs You're at a Lame Super Bowl Party, available at <http://www.cbs.com/latenight/lateshow/topten/lists/20010128.shtml> (last visited Feb. 16, 2001) (demonstrating the popular late night talk show host's comedic "Top Ten List").

3. See *infra* Part 10.

4. See Stephen K. Huber & E. Wendy Trachte-Huber, *Top Ten Developments in Arbitration in the 1990's*, DISP. RESOL. J., Jan. 2001, at 33.

5. See 9 U.S.C. § 201 (1994) (codifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which went into force for the United States on December 29, 1970). This international agreement makes several provisions for the respect of local law. See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 3, 330 U.N.T.S. 38, 40 (1959) [hereinafter New York Convention] ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."); see also *id.* art. 5 at 40, 42 ("Recognition and enforcement of the award

found in the Inter-American Convention on International Commercial Arbitration (“Panama Convention”).<sup>6</sup>

## II. THE TOP TEN LIST

### 1. *Enactment of National Arbitration Laws: UNCITRAL Model Law*

The United Nations Commission on International Trade Law (“UNCITRAL”) promulgated a Model Law on International Commercial Arbitration that has been adopted during the 1990s by about thirty-five jurisdictions.<sup>7</sup> Australia, Scotland, Singapore and Hong Kong are among the countries to enact the Model Act.<sup>8</sup> The prior Singapore law followed the 1950 English statute.<sup>9</sup> While Brazil adopted only the Panama Convention in 1996 and not the New York Convention,<sup>10</sup> it is still worthy to note because of its economic importance and because it was the first pro-arbitration statute enacted in Brazil.<sup>11</sup> The Model Law has been enacted in

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may be refused . . . if . . . [t]he composition of the arbitral authority or the arbitral procedure was not in accordance with . . . the law of the country where the arbitration took place; or [t]he award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”).

6. John P. Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, (1999) available at <http://www.texasadr.org/panama.html> (added Jan. 27, 2000) (noting that in the absence of substantive guidance indicating what is required to confirm an award, the Panama Convention “leaves this question to the vagaries (or, at least, variety) of national laws”).

7. See Lucy F. Reed, *Drafting Arbitration Clauses*, in INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2000 563, 590 (PLI Litig. & Admin. Practice Course Handbook Series N. H0-005R, 2000), available in WL 624 PLI/LIT 563 (listing thirty countries that have adopted the Model Law). For everything you want to know about the background of the Model Law, and much more, see generally HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (1989).

8. See Reed, *supra* note 7.

9. See Jan K. Schaefer, *Borrowing and Cross-Fertilising Arbitration Laws—A Comparative Overview of the Development of Hong Kong and Singapore Legislation for International Commercial Arbitration*, J. INT’L ARB., Dec. 1999 at 55 (discussing also the Hong Kong law prior to 1990).

10. See Cristina Schwansee Romano, *The 1996 Brazilian Commercial Arbitration Law*, 5 ANN. SURV. INT’L & COMP. L. 27, 33 (1999).

11. See, e.g., Paul Blustein, *Brazil Devalues Currency; Wider Crisis Feared; Global Markets Fall*, WASH. POST, Jan. 14, 1999, at A1 (stating that “Brazil is Latin America’s largest economy by far, and the eighth largest in the world, so the IMF and the U.S. Treasury believe that staving off financial collapse there is crucial to ensuring continued economic expansion in the United States and Europe;” further asserting that “Brazil is an important market for U.S. exports” and that “U.S. banks have lent the country \$25 billion” but also noting that the “\$8 trillion American economy is big enough to withstand major losses in its business and financial ties with Brazil”); Romano, *supra* note 10, at 27 (characterizing Brazil’s adoption of an arbitration statute as “a move to create a more hospitable environment for commercial arbitration”).

Finland (1992)<sup>12</sup> and Tunisia (1993).<sup>13</sup> In Canada, the Model Law was adopted at the provincial rather than the national level.<sup>14</sup> Even in those nations that decided not to adopt the Model Law, consideration of the UNCITRAL approach has influenced the shape and contents of the nonuniform legislation that was enacted.<sup>15</sup>

Perhaps the most important foreign legislative development to an American audience is the enactment of the English Arbitration Act in 1996. While some substantive changes were made, the main impact of this Act was to place together in one clear arbitration statute a body of standards and requirements that previously were scattered across several different laws.<sup>16</sup> Sweden adopted a new arbitration act in 1999.<sup>17</sup> This is an important development because Stockholm is a commonly used situs for arbitration proceedings.<sup>18</sup> Taiwan also recently adopted a new arbitration law.<sup>19</sup> By way of contrast, our Federal Arbitration Act (FAA) has remained basically unchanged since its enactment in 1925.<sup>20</sup>

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12. See New York Convention, *supra* note 5, at 71 (listing Finland as a signatory to the New York Convention); Carolita L. Oliveros, *Options for Developing a Foreign Market, in INTERNATIONAL DISTRIBUTION ISSUES: CONTRACT MATERIAL*, at 961 (ALI-ABA Course of Study, Mar. 9, 2000), available in Westlaw, SE 47 ALI-ABA 917 (noting that Finland's arbitration statute "essentially adopts the principles established by UNCITRAL").

13. See Reed, *supra* note 7, at 390–91 n.15 (citing to Tunisia Law No. 93–42, 26 April 1993).

14. See Jeffrey L. Friesen, *The Distribution of Treaty-Implementing Powers In Constitutional Federations: Thoughts On The American And Canadian Models*, 94 COLUM. L. REV. 1415, 1436–37 (1994) (noting that "only some of the provinces have implemented [the Model Law]").

15. See Nathalie Voser, *in Should International Arbitration Awards Be Reviewable?*, 94 AM. SOC'Y INT'L L. PROC. 126, 128 (Apr. 2000).

16. See Harold Crowter, *New Arbitral Legislation: English Arbitration Act 1996: Arbitration in Great Britain: Education of Arbitrators*, 5 CROAT. ARB. Y.B. 71, 72 (1998) (reporting that the English Arbitration Law was enacted to "remedy the deficiencies in its arbitration law, and given encouragement by the UNCITRAL Model Law, further to develop international arbitration law").

17. See Sigvard Jarvin & Briana Young, *A New Arbitration Regime in Sweden: The Swedish Arbitration Act 1999 and the Rules of the Stockholm Chamber of Commerce*, J. INT'L ARB., Sept. 1999, at 89.

18. See Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT'L L. REV. 221, 224–25 (1998) (noting that the Stockholm Chamber of Commerce is among the "common and prestigious institutions offering arbitration . . . services").

19. See Catherine Li, *The New Arbitration Law of Taiwan—Up to an International Level?*, J. INT'L ARB., Sept. 1999, at 127. The Arbitration Law of Taiwan "was promulgated on 24 June 1998 and entered into force six months later." *Id.*

20. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 404 (1999).

## 2. *Uniform U.S. Arbitration Law: FAA Preemption of State Law*

In a federal system such as the United States (but hardly any other countries), consideration must be given to the law of the states as well as federal law. When there is a conflict between federal and state law, federal law controls and the state law is supplanted; the formal name for this result is the preemption doctrine.<sup>21</sup> For present purposes, the FAA serves to preempt state arbitration statutes—every American state has enacted a general arbitration act—and other statutory or common laws relating to dispute resolution.<sup>22</sup> This uniformity begets predictability, an important consideration where American law is applicable to an international dispute, or being considered as the governing law.

The basis for federal arbitration law is the commerce clause of the U.S. Constitution, which allows federal control of foreign and interstate commerce, or activities “involving” such commerce.<sup>23</sup> In practice, virtually all activity that can in some sense be characterized as economic is subject to federal control under the commerce clause.<sup>24</sup> The “separability doctrine” prohibits states

21. See BLACK'S LAW DICTIONARY 1197 (7th ed. 1999); see also Caleb Nelson, *Preemption*, 86 VA. L. R. 225 (2000) (arguing that “the supremacy clause puts questions about whether a federal statute displaces state law within the same framework as questions about whether one statute repeals another”). This statement is a radical oversimplification of a complex and often disputed area of law. There is a continuous struggle for power between the states and the federal government. Judges often support local control over the abstract power of a distant federal government. Indeed, some state judges engage in what can only be described as “civil disobedience”—willful disregard of clearly established law—in declining to preempt local law in the face of overriding federal law. See, e.g., *infra* notes 26–31 and accompanying text (discussing *Allied-Bruce Terminex Cos., Inc. v. Dobson*, 513 U.S. 265 (1995)); *infra* notes 32–54 and accompanying text (discussing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)).

22. See Daniel A. Zeff, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C. J. INT'L LAW & COM. REG. 705, 706 & n.3 (1997) (noting that both the U.S. and its constituent states have enacted arbitration statutes and quoting *Volt Info Scis., Inc. v. Bd. Of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) which explained that state law may be preempted “to the extent it actually conflicts with federal law”). Most state arbitration statutes are based on the Uniform Arbitration Act (1955). See Nat'l Conference of Comm'rs on Uniform State Laws, *Summary: Uniform Arbitration Act*, available at [http://www.nccusl.org/uniformact\\_summaries/uniformacts-s-aa.htm](http://www.nccusl.org/uniformact_summaries/uniformacts-s-aa.htm) (last revised in 2000) [hereinafter NCCUSL]. A revised version of the Uniform Arbitration Act (“UAA”) has been drafted, and presently is being considered by the National Conference of Commissioners on Uniform State Laws (NCCUSL). See NCCUSL, *A Few Facts About the Uniform Arbitration Act*, available at [http://www.nccusl.org/uniformact\\_factsheets/uniformacts-fs-aa.htm](http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-aa.htm) (last visited Feb. 16, 2001).

23. U.S. CONST. art. I, § 8, cl. 3. For the origin of this doctrine in the arbitration context, see *Southland Corp. v. Keating*, 465 U.S. 1, 11–16 (1984).

24. See generally Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 (1995) (discussing the constitutional impact of the Supreme Court's ruling in *United States v. Lopez*, 514 U.S. 549 (1995), in which it struck down “for

from applying substantive law regarding voidable contracts to prevent enforcement of an arbitration agreement.<sup>25</sup> Two important Supreme Court arbitration decisions issued in the 1990s, one based on a consumer contract and one on a business transaction, serve to illustrate the scope and importance of the preemption of state law.

*Allied-Bruce Terminex Cos., Inc. v. Dobson*<sup>26</sup> arose from a contract that provided for arbitration of disputes between a locally owned pest control company (which was also a franchisee of a national firm) and a homeowner. Subsequently, termite infestation was discovered, the homeowner brought suit, and the pest control company sought to have the state court enforce the arbitration provision. An Alabama statute prohibited the enforcement of pre-dispute arbitration agreements.<sup>27</sup> "While such broad anti-arbitration legislation is rare[, perhaps unique], many states have adopted statutes that seek to protect consumers, franchisees, and local firms by limiting the scope and application of arbitration and forum selection clauses."<sup>28</sup>

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the first time in almost sixty years" "an Act of Congress that aimed at regulating citizens rather than states").

25. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-03 (1967) (agreeing by implication that "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are imbedded" by explaining that, under section 4 of the United States Arbitration Act of 1925, "with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue'" (citation omitted). The Supreme Court answered in the affirmative whether the result of such a rule was constitutional. See *id.* at 404-05 ("[T]he question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate[, pursuant to its control over interstate commerce and over admiralty]. The answer to that can only be in the affirmative."); see also William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 143 (1997) (explaining that without the doctrine of separability, "arbitrators could not declare the main contract void for illegality without thereby undermining their jurisdiction to do so"). The consequence of the separability doctrine is not to reject claims that an apparently binding agreement should not enforce due to fraud in the inducement or other theories. See *id.* Rather, these claims must be raised in arbitration, as provided in the contested agreement, rather than before a court. Even if the arbitral panel finds that the purported contract is voidable, the dispute is carried to decision in arbitration rather than returned to the courts. See *id.*

26. 513 U.S. 265 (1995).

27. See *id.* at 269 (citing and describing the mandates of ALA. CODE § 8-1-41(3) (1993).

28. Huber & Trachte-Huber, *supra* note 4 at 26. See, e.g., CAL. BUS. & PROF. CODE § 20040 (West 1997) (allowing the formation of arbitration agreements, but requiring adherence to specified statutory standards); CONN. GEN. STAT. ANN. § 42-1331(g) (West 2000) (allowing application to superior court for "confirmation, modification, correction, or vacation" of arbitration decisions); MICH. COMP. LAWS ANN. § 445.1527(f) (West 2000) (making void any provision in a document relating to a franchise requiring arbitration to be conducted out of state).

The Supreme Court held that the Alabama statute was preempted by the FAA, and therefore the dispute was to be decided by arbitration rather than a judicial trial.<sup>29</sup> The Court reached this result despite an extraordinary amicus brief filed by twenty state attorney generals, which argued that the Court should uphold the state statute.<sup>30</sup> The Court also gave the broadest possible preemptive scope to the commerce power in the arbitration context.<sup>31</sup> Few if any contracts will have less connection to interstate commerce than a transaction between a small, locally owned business and an individual homeowner.

*Doctor's Assocs., Inc. v. Casarotto*<sup>32</sup> grew out of an arbitration term in a form contract between the franchisor of Subway sandwich shops and its Great Falls, Montana franchisee. The agreement specified that arbitration proceedings were to take place in Bridgeport, Connecticut, the location of Doctor's Associates, Inc.'s ("DAI") main office under Connecticut law.<sup>33</sup> A Montana statute expressly called for the enforcement of arbitration provisions in written contracts, provided that the arbitration term was "in underlined capital letters on the first page of the contract."<sup>34</sup> None of these three requirements were satisfied: the arbitration provision was on page nine, in ordinary print, and not underlined.

The State of Montana, appearing to defend its statute, argued that the legislation was not hostile to arbitration because it merely channeled the use of the arbitration process in a manner that ensured an informed decision by persons signing arbitration agreements, thus distinguishing this case from *Dobson*. This approach was dispatched with ease. The principle adopted by the Supreme Court is that a state may not single out arbitration provisions for adverse treatment.<sup>35</sup>

An additional factor which may have swayed the Court is that efforts to achieve the "informed consent" objective claimed by Montana differ from state-to-state. In response to a supposition at oral argument by Justice Ginsburg (the author of the *Casarotto* opinion), counsel for DAI offered several examples: New York required 12-point type; California required 10-point type; Iowa

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29. See *Dobson*, 513 U.S. at 272-73.

30. See *id.* at 272.

31. *Id.* at 273-74.

32. 517 U.S. 681 (1996).

33. See *Casarotto v. Lombardi*, 886 P.2d 931, 933 (Mont. 1994), *rev'd* 517 U.S. at 681 (1996).

34. See *Doctor's Assocs., Inc.*, 517 U.S. at 683 (quoting MONT. CODE ANN. § 27-5-114(4) (1996) (repealed 1997)).

35. See *id.* at 687.

required that arbitration terms be separately signed by the parties; and Texas required initialing of the arbitration provision by the lawyers for each party.<sup>36</sup> Adoption of the Montana position would have undermined the important goal of promoting national uniformity in commercial laws and practices.<sup>37</sup>

The *Doctor's Associates, Inc.* opinion is notable for its brevity, and for the Supreme Court's thinly disguised irritation with state courts that do not understand, or are unwilling to heed, the law of the land: "[w]e have several times said;"<sup>38</sup> "[i]t bears reiteration . . . that;"<sup>39</sup> "[r]epeating our observation in *Perry*;"<sup>40</sup> "[t]he Montana Supreme Court misread our *Volt* decision;"<sup>41</sup> "[i]n *Allied-Bruce*, we restated."<sup>42</sup> States are permitted to regulate arbitration provisions based on general principles of contract law.<sup>43</sup> States may not, however, decide that the basic contract terms (price, quantity, quality, delivery, credit) are fair enough to enforce, but that the arbitration term is not fair enough to enforce.<sup>44</sup> This principle applies equally to legislative enactments and judge-made law.<sup>45</sup>

A good way to close this discussion of the Supreme Court's preemption (and forum selection) jurisprudence is to consider, by way of contrast, the views of Justice Trieweler of the Montana Supreme Court, as expressed in his *Casarotto* opinions below.<sup>46</sup> Trieweler produced two opinions: one for the majority of the court<sup>47</sup> "in language appropriate for judicial precedent,"<sup>48</sup> and a second opinion in which he stated his personal views about federal

36. See Huber & Trachte-Huber, *supra* note 4, at 26.

37. See *Doctor's Assocs., Inc.*, 517 U.S. at 688 (noting that the Montana statute's notice requirement would invalidate the parties' arbitration clause, a result "antithetical" to the "goals and policies of the FAA and Supreme Court precedent").

38. *Id.* at 687.

39. *Id.*

40. *Id.* at 686.

41. *Id.* at 688.

42. *Id.* at 685.

43. See *Allied-Bruce Terminex Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (stating that "[9 U.S.C. section] 2 gives states a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision" and noting that "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract'" (citation omitted).

44. See *id.* (explaining that states may not "place arbitration clauses on an unequal footing," directly contrary to the Act's language and congress' intent").

45. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

46. See *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994).

47. See *id.*

48. *Id.* at 939 (Trieweler, J., specially concurring).



arbitration law, in less judicious language.<sup>49</sup> Paraphrasing would not do justice to the substance of Justice Trieweiler's views, or to his style of presentation, so they are excerpted in his words.

In Montana, we are reasonably civilized [people] . . . . We believe in the rule of law . . . . We believe that our courts should be accessible to all, regardless of their economic status, or their social importance, and therefore, provide courts at public expense and guarantee access to everyone . . . .<sup>50</sup>

. . . .

What [federal court decisions] do, in effect, is permit a few major corporations to draft contracts . . . that immunize[] them from accountability under the laws of the states where they do business, and by the courts in those states . . . . These insidious erosions of state authority and the judicial process threaten to undermine the rule of law as we know it.<sup>51</sup>

. . . .

This . . . [judicial] arrogance not only reflects an intellectual detachment from reality, but a self-serving disregard for the purposes for which courts exist . . . . [J]udges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens. The last I checked, there were plenty of capable people willing to do so.<sup>52</sup>

That the Supreme Court saw *Doctor's Associates, Inc.* as an easy case, and dispatched it summarily, is the best evidence of the strength of the favorable view of arbitration by American courts. The Supreme Court granted certiorari twice on the Montana Court's *Casarotto* decisions, and on its first look at the case, the Court remanded it to the state court for reconsideration in light of

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49. *See id.* ("I offer this special concurring opinion as my personal observation regarding many of the federal decisions which have been cited to us as authority.")

50. *Id.*

51. *Id.* at 941.

52. *Id.* at 940.

its *Dobson* decision.<sup>53</sup> The Montana court failed to heed this hint to reverse its prior decision, whereupon the Supreme Court heard the case and reversed on the basis of *Dobson*.<sup>54</sup> The arguments raised by Justice Triewweiler were not deemed worthy of discussion, let alone of refutation.

### 3. Arbitration of Statutory Claims

Traditionally, the scope of arbitrable claims was limited to those over which the parties had contractual power, which includes statutory provisions subject to waiver (default rules).<sup>55</sup> The scope of international arbitration was assumed to exclude mandatory national laws, for example, securities, antitrust, civil rights, and consumer protection statutes.<sup>56</sup> American law has taken a dramatic step away from this tradition, with arbitration being treated as simply an alternative forum for raising statutory as well as contractual claims. This new approach originated with the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>57</sup> an international dispute in which the contract called for arbitration in Japan, but the American plaintiff sought a court (jury) trial on a variety of theories including an antitrust claim.<sup>58</sup> The Supreme Court stated:

53. See *Doctor's Assocs., Inc. v. Casarotto*, 515 U.S. 1129, 1129 (1995).

54. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996).

55. See *Shearson/American Express v. McMahon*, 482 U.S. 220, 226–27 (1987) (“[T]he Arbitration Act’s mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”). The court stated that such an intent “to limit or prohibit waiver of a judicial forum for a particular claim . . . ‘will be deducible from [the statute’s] text or legislative history,’ or from an inherent conflict between arbitration and the statute’s underlying purposes.” *Id.* (citation omitted).

56. See, e.g., *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) (holding that arbitration should not be enforced for the antitrust claim at issue); *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1539 (M.D. Ala. 1997) (explaining that the Magnuson-Moss Act prevents manufacturers from using arbitration clauses within warranties as a means of barring consumers from judicial remedies); Romualdo P. Eclavea, Annotation, *Construction and Application of § 14 of Securities Act of 1953 (15 U.S.C.A. § 77n) and § 29(a) of Securities Exchange Act of 1943 (15 U.S.C.A. § 78cc(a)), Voiding Waiver of Compliance With Statutory Provisions or Rules or Regulations*, 26 A.L.R. FED. 495, 499 (1976) (“The courts have also held that the nonwaiver provisions invalidate an agreement between a seller and purchaser of securities to arbitrate all future controversies arising under the federal securities acts in connection with their transaction,” because the result is “to deprive the purchaser of his right, under the acts, to select the judicial forum.”) (citation omitted).

57. 473 U.S. 614 (1985).

58. See *id.* at 616–17. The antitrust claim appears very weak. See *id.* at 644. The plaintiff car dealer had a clear agenda: to get this dispute with a large Japanese enterprise (and other corporate defendants) before a local jury instead of an arbitration panel in Japan. See *id.* at 666 (noting that the plaintiff’s motivation to avoid foreign arbitration is illustrated by Justice Stevens’ dissenting opinion explaining that the use of foreign arbitrators to resolve

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration . . . . Nothing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.<sup>59</sup>

This language has since been quoted innumerable times by both state and federal courts.<sup>60</sup>

The Supreme Court is, at least in some circumstances, willing to grant greater latitude to international than to domestic arbitral tribunals, based on comity and a “sensitivity to the need of the international commercial system for predictability in the resolution of disputes.”<sup>61</sup> These factors led the Court to order arbitration of the antitrust claims in *Mitsubishi*, “even assuming that a contrary result would be forthcoming in the domestic context”<sup>62</sup> (the courts of appeals have ordered domestic antitrust claims to arbitration,<sup>63</sup> but the Supreme Court has not spoken to this issue since *Mitsubishi*).

*Mitsubishi* was followed by decisions that enforced contract provisions (in contracts of adhesion) calling for arbitration of securities fraud<sup>64</sup> and employment discrimination claims.<sup>65</sup> The

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antitrust cases under the Sherman Act is an “uncertain remedy” and that “[t]his is especially so when there has been no genuine bargaining over the terms of the submission, and the arbitration remedy provided has not even the most elementary guarantees of fair process”).

59. *Id.* at 628.

60. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 31 (1991); *Bradford v. Rockwell Semiconductor Sys.*, No. 99-2201, 2001 U.S. App. LEXIS 832, at \*8 (4th Cir. Jan. 22, 2001) *citing Gilmer*, 500 U.S. at 31; *Brown v. Coleman Co., Inc.*, 220 F.3d 1180, 1182 (10th Cir. 2000) *citing Gilmer*, 500 U.S. at 31; *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999) *citing Gilmer*, 500 U.S. at 31; *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) *citing Gilmer*, 500 U.S. at 31; *Ex parte McNaughton*, 728 So.2d 592, 597 (Ala. 1999) *citing Gilmer*, 500 U.S. at 31; *Broughton v. Cigna Healthplans*, 988 P.2d 67, 76 (Cal. 1999) *citing Gilmer*, 500 U.S. at 31; *Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 803 (Minn. 1995) *citing Gilmer*, 500 U.S. at 31.

61. *Mitsubishi*, 473 U.S. at 629.

62. *Id.*

63. *See, e.g.*, *Kotam Elecs., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724, 728 (11th Cir. 1996) (*en banc*) (holding that “arbitration agreements concerning domestic antitrust claims are enforceable”).

64. *See, e.g.*, *Rodríguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (noting that “resort to the arbitration process [as mandated by a standard customer agreement] does not inherently undermine any of the substantive rights . . . under the Securities Act”); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 223–24, 238

securities area is of particular note because of the importance of the 1933<sup>66</sup> and 1934<sup>67</sup> Acts, and because the Court had to overrule a prior decision that declared federal securities law claims to be inarbitrable.<sup>68</sup> The practical consequence is known to anyone who has an account with a brokerage firm: any potential customer-broker dispute may be subject to arbitration.<sup>69</sup>

Neither the New York Convention nor the FAA exempts statutory claims from arbitration, but of course Congress can legislate that specified claims are inarbitrable.<sup>70</sup> The burden of demonstrating such an intention is a heavy one, and it rests with the party resisting arbitration.<sup>71</sup> The moving party must show, either directly or by deduction, based on the text or legislative history of a statute, that Congress intended to preclude the waiver of a judicial forum.<sup>72</sup>

Sending statutory claims to international arbitration need not amount to an abdication of judicial responsibility. The courts can take a "second look" at the enforcement stage to ensure that the arbitrator properly dealt with statutory claims.<sup>73</sup> The New York

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(1987) (finding no congressional intent in section 29(a) of the Exchange Act to prevent enforcement of an arbitration agreement contained in what the McMahons characterized as an adhesion contract).

65. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (concluding that their was no congressional intent to preclude arbitration of a claim under the Age Discrimination in Employment Act).

66. 15 U.S.C. § 77 (1994 & Supp. V 1999).

67. 15 U.S.C. § 78 (1994 & Supp. V 1999).

68. See *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Court stated that "[a]lthough our decision to overrule *Wilko* establishes a new principle of law for arbitration agreements under the Securities Act, this ruling furthers the purposes and effect of the Arbitration Act without undermining those of the Securities Act." *Rodriguez de Quijas*, 490 U.S. at 485.

69. See, e.g., *Securities Ind. Ass'n. v. Lewis*, 751 F. Supp. 205, 208 (S.D. Fla. 1990) (holding not only that a securities broker-dealer may enter into an arbitration agreement with a customer, but that state laws restricting arbitration agreements are superseded by section 5 of the Federal Arbitration Act).

70. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command."). See, e.g., 46 U.S.C. app. § 183c (Supp. IV 1998) (making it unlawful for "the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation . . . purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction"). See also *supra* notes 55-56 and accompanying text.

71. See *McMahon*, 482 U.S. at 227 (citation omitted).

72. See *id.*

73. See *Mitsubishi*, 473 U.S. at 638 (describing the "second look" doctrine in that "[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate

Convention specifies that enforcement of a foreign arbitration award may be refused because “recognition or enforcement of the award would be contrary to the public policy of that country.”<sup>74</sup>

In the vast majority of instances, however, enforcement of a foreign arbitration award will not be sought in the United States, so no second look review will take place.<sup>75</sup> Nevertheless, all arbitral proceedings that raise statutory claims will have to be conducted in a manner that permits judicial review.<sup>76</sup>

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interest in the enforcement of [United States mandatory laws, e.g., antitrust] have been addressed” and thus reserve the right to refuse enforcement of an award).

74. See New York Convention, *supra* note 5, art. 5(2)(b), at 42.

75. See Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 480 (1999) (noting that because national courts have “typically decline[d] to hear or enforce claims arising under mandatory laws other than their own,” the extent to which the second look doctrine will be applied outside the United States is uncertain and thus, “[p]arties to international arbitrations [are] left guessing about whether nations other than the United States will recognize and enforce the arbitral resolution of claims arising under U.S. mandatory law”).

76. See *supra* notes 73–74 and accompanying text (describing the second look doctrine as allowing courts to review the arbitrator’s resolution of statutory claims at the enforcement stage). In order for courts to properly review the arbitrator’s actions, the arbitral proceedings must be conducted in a manner that would be reviewable. In addition, judicial review may also occur when a court reviews an arbitral award under the “manifest disregard of the law” principle. The D.C. Court of Appeals has discussed review of arbitral awards as follows:

The Supreme Court has also indicated that arbitration awards can be vacated if they are in “manifest disregard of the law.” See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 1923, 131 L.Ed.2d 985 (1995) (citing *Wilko v. Swan*, 346 U.S. 427, 436–37, 74 S.Ct. 182, 187–88, 98 L.Ed. 168 (1953), overruled on other grounds in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989)).

....

Two assumptions have been central to the Court’s decisions in this area. First, the Court has insisted that, “[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at 3354) (alteration in original); see also *McMahon*, 482 U.S. at 229–30, 107 S.Ct. at 2338–40. Second, the Court has stated repeatedly that, “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute’ at issue.” *Gilmer*, 500 U.S. at 32 n. 4, 111 S.Ct. at 1655 n. 4 (quoting *McMahon*, 482 U.S. at 232, 107 S. Ct. at 2340). These twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the “manifest disregard of the law” standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.

The decisions that enforce contract provisions mandating the arbitration of claims arising under federal statutes result in the arbitration of more claims, and the proceedings are more complex. If closer and more law-oriented judicial review is to take place, such proceedings may also require the arbitrators—many of whom are not lawyers<sup>77</sup>—to apply specific statutes, potentially followed by some level of serious judicial review to ensure that arbitration did not deprive a party of substantive statutory rights. This, in turn, would necessitate the creation of an arbitration “record” (perhaps even a full transcript of the proceedings), and a reasoned written opinion with findings of fact and conclusions of law. This approach, if taken seriously, would fundamentally alter the very nature and practice of arbitration as we know it.

#### 4. *Statutory Rights and Arbitration Remedies*

The power of arbitrators in fashioning remedies is extremely broad (absent contrary agreement between the parties).<sup>78</sup> This

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However, one author has indicated that full judicial review of arbitral procedures may not be possible. See Susan A. Fitzgibbon, *Teaching Unconscionability Through Agreements to Arbitrate Employment Claims*, 44 ST. LOUIS U. L.J. 1401, 1410–11 (2000) (“But even the fairest arbitration procedure will be a private proceeding with a privately-selected decision maker and limited judicial review—if it really is still arbitration.”).

In general however, some sort of judicial review usually occurs on the question of arbitrability. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995) (holding that if the parties have agreed to submit the question of arbitrability to arbitration, then the district court “should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances;” but if the parties did not agree to arbitrate the question of arbitrability, “then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration;” and, finally, if the district court should decide whether the parties have agreed to arbitrate the arbitrability question, it should apply state-law contract principles). In other words, no matter what the situation, there is some, albeit to differing degrees, mandatory court review of an arbitration proceeding for statutory claims.

77. See, e.g., *Cole v. Burns Inter. Sec. Servs.*, 105 F.3d 1465, 1477 (D.C. Cir. 1997) (“[T]he competence of arbitrators to analyze and decide purely legal issues in connection with statutory claims had been questioned. Many arbitrators are not lawyers, and they have not traditionally engaged in the same kind of legal analysis performed by judges.”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 n.18 (1974) (“Significantly, a substantial proportion of labor arbitrators are not lawyers.”).

78. See, e.g., *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991) (“Federal courts have taken a broad view of the power of arbitrators to decide disputes arising during the operation of a commercial contract, and concerning the composition, meaning, and scope of that agreement.”); *Konkar Maritime Enters., S.A. v. Compagnie Belge D’Affretement*, 668 F. Supp. 267, 271 (S.D.N.Y. 1987) (“Arbitrators have broad discretion in fashioning remedies and ‘may grant equitable relief that a Court could not.’”) (citing *Compania Chilena de Navegacion Interocanica v. Norton, Lilly Co.*, 652 F. Supp. 1512, 1516 (S.D.N.Y. 1987), citing *Sperry International Trade, Inc. v. Government of Israel*, 532 F. Supp. 901, 905 (S.D.N.Y.), *aff’d*, 689 F.2d 301 (2d Cir. 1982)); see also John Y. Gotanda, *Awarding Punitive damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc.*, 38 HARV.

power is abetted by the extremely limited judicial review of arbitration awards under the New York Convention,<sup>79</sup> and the very limited review under the FAA.<sup>80</sup> We now consider the situation

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INT'L L.J. 59, 90 n.157 (1997) (discussing the limits of the arbitrator's powers under the arbitration agreement).

79. Article 5 of the New York Convention provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra* note 5, art. 5, at 40, 42.

80. See, e.g., *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 824 (2d Cir. 1997) (noting that the Second Circuit has accorded section 10(a)(4) of the FAA "the narrowest reading") (quoting *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991)).

where a party seeks judicial review because the arbitrator underutilized her remedial authority by failing to award relief required by a statute.

Attempts to limit damages (or other relief) in an arbitration agreement, when such relief is specified by statute, will bind the arbitrators but also cause a court to allow a trial and deny arbitration. In *Paladino v. Avnet Computer Technologies*,<sup>81</sup> the court refused to compel arbitration of an employment discrimination claim because the agreement allowed only contract damages while Title VII specifically provided for back pay, reinstatement and other relief not permitted under the agreement.<sup>82</sup> Many other federal and state statutes make specific provisions regarding recoverable damages,<sup>83</sup> and these often will apply to international as well as domestic contracts.<sup>84</sup> While the FAA often preempts state law that would preclude arbitration,<sup>85</sup> the FAA does not change the applicable law to be applied by the arbitrators.<sup>86</sup>

Numerous federal and state statutes mandate the recovery of attorney's fees by a prevailing party.<sup>87</sup> In Texas, the awarding of

81. 134 F.3d 1054 (11th Cir. 1998).

82. Compare *id.* at 1061–62 (Cox, J. concurring) (noting that although the arbitration clause in the employment contract cited a provision for Title VII claims, it was unenforceable because it precluded non-contract damages, and thus, in effect, “denie[d] the employee the possibility of meaningful relief in an arbitration proceeding”), with *id.* at 1058–61 (Hatchett, C.J.) (adopting a somewhat different rationale in holding the arbitration agreement unenforceable on the basis that it did not provide the employee with “fair notice” of statutory remedies).

83. See, e.g., 15 U.S.C. § 77l (1994 & Supp. I 1995) (stating that “[a]ny person who offers or sells a security in violation [of section 77 of this title] shall be liable . . . to the person purchasing such security . . . to recover the consideration paid for such security . . . or for damages if he no longer owns the security”); TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987) (providing for economic damages or damages for mental anguish for deceptive trade practices).

84. *Antco Shipping Co. v. Sidermar*, 417 F. Supp. 207, 215 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 93 (2d Cir. 1977) (holding that international contracts are arbitrable unless remedy is prohibited by pertinent statute or other declaration of public policy).

85. See *Zeft*, *supra* note 22, at 706 & n.3 and accompanying text.

86. See 9 U.S.C. § 2 (1994) (stating that “an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

87. See, e.g., 20 U.S.C. § 1095a(a)(8) (1994) (“The court shall award attorneys fees to a prevailing employee and, in its discretion, may order reinstatement of the individual, award punitive damages and back pay to the employee, or order such other remedy as may be reasonably necessary.”); 46 U.S.C. § 31304(b) (1994) (“A civil action may be brought to recover for losses referred to in subsection (a) of this section. The district courts have original jurisdiction of the action, regardless of the amount in controversy or the citizenship of the parties. If the plaintiff prevails, the court shall award costs and attorney fees to the plaintiff.”); 49 U.S.C. § 11704(d)(3) (Supp. I 1995) (“The district court shall award a reasonable attorney’s fee as a part of the damages for which a rail carrier is



attorney's fees is specified in a variety of cases, including the breach of "an oral or written contract."<sup>88</sup> The tension between honoring the twin goals of ensuring that statutory remedies are in fact awarded to prevailing parties, and the limited judicial review of arbitration awards mandated by the New York Convention and the FAA, is nicely illustrated by *DiRussa v. Dean Witter Reynolds*.<sup>89</sup> DiRussa brought a successful claim under the Age Discrimination in Employment Act ("ADEA"). The ADEA provides for the recovery of attorney's fees by a prevailing party,<sup>90</sup> but the arbitrators did not award such fees to DiRussa.

The arbitration award specified that the claimant sought attorney's fees pursuant to the ADEA. (We leave for another day the problems that arise when the arbitral award does not set out the underlying claims, or the composition of the sum awarded to the prevailing party.) Nevertheless, the Second Circuit confirmed the arbitration award. The court observed that knowing the law is a "daunting task"<sup>91</sup> even for judges, and that while DiRussa admittedly sought attorney's fees under the ADEA, she (more precisely, her attorney) failed to inform the arbitrators that the ADEA required the award of attorney's fees. Accordingly, the

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found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action."); CAL. CIV. CODE § 1811.1 (West 1998) ("Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or installment account subject to the provisions of this chapter regardless of whether such action is instituted by the seller, holder or buyer."); N.Y. U.C.C. LAW § 2-A-108 (McKinney 1995) ("In an action in which the lessee claims unconscionability with respect to a consumer lease: (a) if the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee."); TEX. BUS. & COM. CODE ANN. § 2A.108(d) (Vernon 1994) (There are two different situations a court may award attorney's fees in actions "in which the lessee claims unconscionability with respect to a consumer lease." First, "if the court finds unconscionability under Subsection (a) or (b), the court shall award reasonable attorney's fees to the lessee." Second, "if the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made." However, in "determining attorney's fees, the amount of the recovery on behalf of the claimant under Subsections (a) and (b) is not controlling.").

88. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 1997) (entitling a prevailing party in a contract dispute to seek recovery of attorney's fees); *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 614 (5th Cir. 2000) (noting that "when a claim [under section 38.001] is successful, and reasonable fees are proven, a trial court has no discretion to deny the fees").

89. 121 F.3d 818, 820 (2d Cir. 1997) ("This case implicates the possible clash between two important federal policies: deference to arbitration awards in order to promote that important method of dispute resolution and enforcement of the remedial provisions of a federal statute—the Age Discrimination in Employment Act of 1967 (ADEA) . . .").

90. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (1994) *incorporating by reference* Fair Labor Standards Act, 29 U.S.C. § 216(b) (1994) (allowing reasonable attorney's fees under the Fair Labor Standards Act); see also *DiRussa*, 121 F.3d at 822.

91. See *id.* at 823.

decision of the arbitrators was not in manifest disregard of the law,<sup>92</sup> and did not violate public policy,<sup>93</sup> so the court confirmed the arbitration award.<sup>94</sup>

The court adopted this approach because it saw a decision in favor of DiRussa as risking a dangerous slippery slope. "However innocent DiRussa's argument seems on its face, it could allow a court to vacate an arbitration award any time it disagreed with the arbitrator's interpretation of federal statutory law."<sup>95</sup> One might respond that the arbitrators did not "interpret" the ADEA, but simply failed to award the attorney's fees required by the statute. Even if the Second Circuit overstated the danger of a decision on behalf of DiRussa, the court is clearly right in recognizing the fundamental tension between enforcement of full statutory rights and limited judicial review of arbitration awards. It is safe to say that the courts will have many more opportunities to address this dilemma, and that the attendant problems will be particularly difficult in the international context.<sup>96</sup>

### 5. *Judicial Review of Arbitration Agreements and Awards*

As in Arthur Conan Doyle's story *Silver Blaze*, where the key fact was that the dog did not bark (thus allowing Holmes to deduce that the dog recognized the person who stole the horse),<sup>97</sup> the central message about judicial review of international arbitration awards is that there are hardly any developments important enough to merit discussion. Courts in the United States, and throughout the world, have implemented the New York Convention by consistently confirming arbitration awards rendered in other countries, and doing so with dispatch.<sup>98</sup>

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92. *See id.* at 822-23.

93. *See id.* at 825.

94. *See id.* at 826.

95. *Id.* at 825.

96. *See* McConnaughay, *supra* note 75, at 459 (noting that "[i]f the Supreme Court shies away from meaningful review of mandatory law arbitrations, there is a great risk that international businesses will escape the regulatory dictates of U.S. law, perhaps to the substantial detriment of nonparticipating third parties or the public," but also recognizing that "if the Supreme Court's 'second look' involves an appropriately searching review of arbitrations including mandatory law claims, the resulting procedural adjustments to the arbitral process necessary to enable such a review likely would threaten arbitration's continuing utility for the resolution of important cross-cultural non-mandatory law claims, which form the heart of most international arbitrations.").

97. 2 SIR ARTHUR CONAN DOYLE, *THE ANNOTATED SHERLOCK HOLMES: THE FOUR NOVELS AND THE FIFTY-SIX STORIES COMPLETE* 261, 280 (William S. Baring-Gould ed., Clarkson N. Potter, Inc. 1967) (1890).

98. *See generally* Alan S. Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213 (1996) (discussing U.S. courts' application and enforcement of the New York Convention).

The New York Convention provides standards for confirmation of arbitration awards rendered in a country other than the one in which enforcement is sought, but when confirmation is sought in the country where the award was rendered the applicable legal standards are found in national law.<sup>99</sup>

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . . .<sup>100</sup>

The national law includes implied as well as statutory grounds for declining to enforce an arbitral award.<sup>101</sup> (Unlike the FAA, the New York Convention does not make provision for the vacatur of an arbitration award.)<sup>102</sup>

Arbitration agreements are meant to be enforced as a matter of course in both the domestic and international context. An exception cannot prove a rule, but the occasional exception does serve to illustrate what an extreme situation is required for an American court to refuse to enforce an agreement for arbitration in an international forum. In an arguably domestic maritime case, *Jones v. Sea Tow Services Freeport NY Inc.*,<sup>103</sup> the Second Circuit declined to order the parties to arbitration in England.<sup>104</sup> It was a

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99. See generally *Lander Co. Inc. v. MMP Inv., Inc.*, 107 F.3d 476, 480–81 (7th Cir. 1997) (noting that the New York Convention applies to “arbitral awards made in a different country from which enforcement is sought” while the FAA “authorizes confirmation only in the court specified in the arbitration agreement . . . or in the district in which the arbitration was conducted”).

100. New York Convention, *supra* note 5, art. 1, at 38.

101. Compare 9 U.S.C. § 2 (1994) (positing that an agreement providing for arbitration of a dispute shall be valid “save upon grounds as exist at law or in equity for the revocation of any contract”), with 9 U.S.C. § 10 (1994) (providing that an award may be set aside if certain statutory conditions are met); see also *Yusef Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997) (noting that U.S. courts may set aside awards under the New York Convention that were vacated by different domestic jurisdictions under the FAA).

102. See New York Convention, *supra* note 5, art. 5(1)(e), at 42; *Lander Co., Inc.*, 107 F.3d at 478 (noting that while the New York Convention does not explicitly provide for the vacation of an award, it does contemplate the “possibility of the award’s being set aside in a proceeding under local law”).

103. 30 F.3d 360 (2d Cir. 1994).

104. See *id.* at 361, 366. This decision has been critiqued at length. See Rau, *supra* note 98, at 242–56 (stating that “one clear implication” of the *Jones* decision is that “a federal court would have no jurisdiction under the Convention either to compel arbitration in London . . . or to confirm an award that might later be rendered in the London arbitration;” further noting that “[t]his is in fact the holding of a number of lower court decisions preceding *Jones*, with which the Second Circuit expressly indicated its agreement” and concluding that “I think such a position is highly questionable—resting as it does on a misunderstanding of the Convention—and I will discuss why in

dark and stormy night—anyway, a “cold and rainy night.”<sup>105</sup> Mr. and Mrs. Jones were on their 33-foot pleasure craft, MISS JADE II, when the boat capsized near shore. A passing Good Samaritan helped them secure the ship to the shore. Both Mr. and Mrs. Jones were slightly injured, and Mr. Jones was left unable to read due to the loss of his glasses.

The Joneses notified the Coast Guard, which in turn contacted a local salvage firm named Sea Tow, whose representatives arrived in a land vehicle. The Joneses then huddled in the vehicle, trying to learn about the contract the Captain insisted they sign or else face the prospect of being left there at the shore with their ship. Even with glasses available, Mr. Jones would have had trouble reading the contract. Sea Tow claimed that its agent fully and fairly explained the contract terms, including the meaning of salvage, to the Joneses. Mr. and Mrs. Jones, of course, told a very different story. Mrs. Jones said she wanted to consult with a lawyer, to which Sea Tow said no signature, no service.

After Sea Tow finally obtained a signature on their document, they towed MISS JADE II six miles to a marina. Captain Raia of Sea Tow wrote on the contract that it was signed on the ship, which Sea Tow admitted was untrue. Sea Tow sought to be paid over \$15,000 for their services, based on a percentage value of the vessel.

The contract—Lloyd's Standard Form of Salvage Agreement, commonly known as Lloyd's Open Form (LOF)—stated that Sea Tow was providing salvage services to the Joneses. The LOF called for arbitration in England under English law, and the district court so ordered.<sup>106</sup> The contracting parties both were American, and the services were provided entirely in American waters. In the absence of any nexus to England, apart from that purportedly created by the contract, the Second Circuit ruled that there was no basis for invoking the Convention, and thus no basis for ordering the dispute to arbitration in England.<sup>107</sup> The case was returned to the district court for “further proceedings consistent” with the Second Circuit opinion<sup>108</sup> presumably for arbitration in New York, but the

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more detail shortly”); 4 IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 44.9.4.3, at 44:87–44:88 (Aspen Law & Business 1999 Supp.) (questioning the *Jones* decision); see generally Edward V. Cattell, Jr., *Recreational Vessel Salvage Arbitration: An Interim Report*, 29 J. MAR. L. & COM. 257, 259–60 & n. 8 (1998) (questioning whether *Jones* and cases like it are still good law after *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)).

105. See *Jones*, 30 F.3d at 362.

106. See *id.*

107. *Id.* at 366.

108. *Id.*

court did not say so explicitly. The result in *Jones* may have been affected by the distasteful prospect of an arbitration award of over \$15,000 in favor of Sea Tow under English salvage law for towing the Jones' boat for a mere six miles, entirely within coastal U.S. waters.

#### 6. *Expanded Judicial Review of Arbitration Awards by Contract*

Arbitration proceeded for many decades with judicial review based exclusively on the standards specified in the FAA<sup>109</sup>—neither more nor less. Only in the 1990s was the idea of expanded review at the behest of arbitration parties even broached by the courts.<sup>110</sup> The federal courts of appeals are split 2-2 on the validity of such opt-in review provisions,<sup>111</sup> and even the leading case that recognizes opt-in review admits to substantial limitations on what parties can do by contract.<sup>112</sup> The few state cases, all from intermediate level courts, are dubious about opt-in review.<sup>113</sup>

The leading case, *LaPine Technology Corp. v. Kyocera Corp.*,<sup>114</sup> grew out of a computer venture between a large Japanese manufacturer and a U.S. entity financed by a Prudential Trade affiliate.<sup>115</sup> A dispute arose that was arbitrated by the ICC<sup>116</sup>, which

109. See, e.g., *Reid Beverage Distrib., Inc. v. Pepsi-Cola Bottling Co. of N.Y., Inc.*, 1987 WL 11690 (S.D.N.Y., 1987) (“The court’s power to review an arbitration award is severely limited under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. *Amoco Overseas Oil v. Astir Navigation Co.*, 490 F. Supp. 32, 37 (S.D.N.Y. 1979). An award may be vacated only on one of the grounds specified in 9 U.S.C. § 10. *Bell Aerospace Co. Div. of Textron v. Local 516, INT U., Etc.*, 500 F.2d 921, 923 (2d Cir. 1974).”).

110. See *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991) (ruling ultimately that parties cannot contract for heightened judicial review beyond what the FAA provides).

111. See *UHC Mgmt. Co., Inc. v. Computer Scis. Corp.*, 148 F.3d 992, 999 (8th Cir. 1998) (opposing heightened review); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997) (supporting heightened review); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) (supporting heightened review); *Chicago Typographical Union*, 935 F.2d at 1504–05 (Posner, J.) (opposing heightened review).

112. See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J. concurring) (limiting the contracting parties to adopting the kinds of standards of appellate review that are normally performed by United States Courts).

113. See, e.g., *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995) (negating the parties’ attempt to create substantive appellate review of any arbitral award, instead requiring the parties to be bound by the applicable state arbitration statute’s rules of review). *But see Nab Const. Corp. v. Metropolitan Transp. Authority*, 579 N.Y.S.2d 375, 375, (N.Y. App. Div. 1992) (permitting parties to expand judicial review of arbitral awards if the court’s review is to determine if an award was capricious, arbitrary, or in bad faith). See also Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 254–60 (1999) (discussing cases that have both enforced and refused expanded review clauses).

114. 130 F.3d 884 (9th Cir. 1997).

115. See *LaPine Tech. Corp. v. Kyocera Corp.*, 909 F. Supp. 697, 699 (N.D. Cal. 1995).

was followed by a request for enhanced judicial review (for substantial evidence or errors of law), as provided by the arbitration term of the parties' contract.<sup>117</sup> The three-judge panel generated three different opinions.

Judge Fernandez, in the opinion of the court, allowed enhanced judicial review as consistent with the strong policy favoring arbitration, and of honoring party agreements.<sup>118</sup> Judge Mayer, in dissent, adopted the principle that the parameters for judicial review are established in the FAA, and are not subject to variation by contract.<sup>119</sup> Judge Kozinski, in opting to allow opt-in review, noted that he found the question "closer than most."<sup>120</sup>

Opt-in review can impose major burdens on district courts, as is demonstrated by the situation in *LaPine*. The district court was not reviewing a completed arbitration process, but only the first part of a bifurcated decision process.<sup>121</sup> Even that proceeding took four years, and produced thousands of exhibits and documents.<sup>122</sup> Standard practice for arbitrators is to admit all proffered documents and exhibits into evidence,<sup>123</sup> thereby producing an expansive body of material that is, as the district judge noted, "apparently unaided by the various modalities available to district courts to narrow issues and facilitate ultimate disposition."<sup>124</sup>

The substantive issue in *New England Utilities v. Hydro-Quebec*<sup>125</sup> related to the price provision in a long term, huge dollar contract for the supply of electricity. The agreement was over fifty pages long, with parallel columns in French and English. As one would expect, the pricing structure is complex and takes account of many factors. The choice of law provision specified the law of Quebec. Even with the assistance of a court librarian and a law clerk, the district judge was unable to locate a reliable compendium of Quebec law in any Boston law library or even an electronic

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116. *See id.*

117. *See LaPine*, 130 F.3d at 887.

118. *See id.* at 888-90.

119. *See id.* at 891.

120. *Id.*

121. *See LaPine Tech. Corp.*, 909 F. Supp. at 699.

122. *See id.* at 706.

123. *See* Edward W. Dunham, et al., *Franchisor Attempts to Control the Dispute Resolution Forum: Why the Federal Arbitration Act Trumps the New Jersey Supreme Court's Decision in Kubis*, 29 RUTGERS L. J. 237, 270 (1998) (stating there is a "tendency of many arbitrators to admit all proffered evidence").

124. *LaPine Tech. Corp.*, 909 F. Supp. at 706.

125. 10 F. Supp. 2d 53 (D.Mass. 1998).

version.<sup>126</sup> The arbitration “record” was voluminous, so serious review of fact and law would constitute a major undertaking.

If parties can require district courts to review the findings of fact and conclusions of law made by an arbitrator, widespread adoption of such review provisions would noticeably increase the workload of district courts. This is contrary to what is often stated to be a major systemic benefit of arbitration—reduction of the workload of courts.<sup>127</sup>

Even more serious than the total workload is the timing of judicial review. The FAA provides for rapid and summary review of arbitration awards.<sup>128</sup> The rationale for the “streamlined procedure, found in the FAA and other modern arbitration statutes,” is that such review is so limited.<sup>129</sup> The FAA states that “any application” made pursuant to the FAA “shall be made and heard in the manner provided by law for the making and hearing of motions.”<sup>130</sup> Motions get heard promptly, while cases must queue up behind other civil proceedings not favored by statute.

And, for defective awards, the parties nearly always would have to start the arbitration process anew, before a different arbitrator. Courts have a permanent existence, so an appellate tribunal usually can send a case back to the same trial court for something less than a new trial before a new judge. Arbitration, however, is an ad hoc process, with the power of the arbitrator ending with the issuance of a decision (“*functus officio*”).<sup>131</sup>

None of the small number of opinions that permit parties to expand the scope of judicial review considers the consequences of the freedom of contract rationale that underlies this approach. If

126. See *id.* at 64 (noting that the court lacked the computer assisted resources to independently research Quebecois law).

127. See, e.g., *LaPine*, 909 F. Supp. at 706 (noting that judicial review of the “record of substantial magnitude . . . simply does not comply with the benefits usually contemplated by those who favor arbitration as an effective form of alternative dispute resolution”).

128. See 9 U.S.C. §§ 9 (1994) (providing for confirmation of award if requested within one year of the award’s making), 12 (providing three month deadline after an award is filed or delivered for party to give notice of motion for vacation, modification or correction), 13 (providing limited record for review), 16 (providing appellate review for exhaustive list of court orders).

129. See 4 MACNEIL ET AL., *supra* note 104, § 38.1.1, at 38:6; see also Edward Brunet, *Securities Arbitration: A Decade After McMahon: Toward Changing Models of Securities Arbitration*, 62 BROOKLYN L. REV. 1459, 1473 (1996) (noting that review of arbitration awards is “necessarily” limited).

130. 9 U.S.C. § 6 (1994).

131. See *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000) (“This court has noted: ‘[The] rule [of *functus officio*] was based on the notion that after an arbitrator has rendered an award, his contractual powers have lapsed and he is ‘*functus officio*.’”) (citation omitted).

the judicial review provisions of the FAA are only default rules, is freedom of contract a two-way street that permits parties to contract for less judicial review? To our knowledge, no court has taken this position, but symmetry suggests an affirmative answer, as does the public policy favoring arbitration. A plausible alternative is to treat the FAA as establishing a minimum level of required judicial review, but not prohibiting parties from agreeing to greater review. Such asymmetry is a reasonable approach for a legislature to adopt, but there is no basis for a court to assert that Congress so intended.<sup>132</sup>

If judicial review of arbitration awards can be expanded by contract, are there limits short of the absurd on the exercise of this power? Only Judge Kozinski, who favors “opt-in” review, has addressed this problem: “I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.”<sup>133</sup> This concession does not address the central question: what is the scope of freedom of contract to craft opt-in review? One can imagine a considerable array of reasonable opt-in review provisions that are different from “findings of fact and conclusions of law,” yet are far short of “flipping a coin or studying the entrails of dead fowl.” And, if opt-in district court review by contract is permitted under the FAA, why not also opt-in review standards for courts of appeals?

A bright line rule—review pursuant to the FAA provisions, neither more nor less—best follows the statute, and also is the most sensible approach for the courts. The charting of a different course, and the contours of that course, should be left to the legislative branch of government. While this discussion is based on the FAA and federal cases, the same arguments, *mutatis mutandis*, apply to proceedings governed by the UAA.

### 7. Arbitration Award Annulled in Country of Issue

May an arbitration award that has been set aside by a court in the country of origin nevertheless be enforced in the courts of another country that has adopted the New York Convention? This seemingly arcane question has become perhaps the most “hotly debated topic in international arbitration practice.”<sup>134</sup>

132. Congress adopted an asymmetrical position regarding judicial review in the context of arbitrability disputes. An order that denies arbitration is immediately appealable, but an order that sends a dispute to arbitration is not appealable. Compare 9 U.S.C. § 16(a)(1) (1994) with 9 U.S.C. § 16(b) (1994).

133. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J. concurring).

134. Brian King, *Enforcing Annulled Awards: U.S. Courts Chart Their Own Course*, MEALEY'S INT'L ARB. REP., Jan. 2000, available in WL 15 No. 1 MINTARBR 15.



France was the only nation that refused to recognize the annulment of an arbitration award by the courts in the country of origin.<sup>135</sup> France will decide whether an arbitration award rendered in another country is worthy of enforcement in France.<sup>136</sup> Action by a court in another country may be relevant, but it is hardly dispositive. This approach led Albert Jan van den Berg to famously observe: “[i]f an award is set aside in the country of origin, a party can still try its luck in France.”<sup>137</sup> Jan Paulsson questions the potential recognition of arbitration awards annulled by the courts of the situs state on policy ground: “Unless other legal systems respect that outcome, the consequence might be inconsistent decisions and vast confusion.”<sup>138</sup> Multiple actions are also possible, with the prevailing party in arbitration going from country to country searching for enforcement.<sup>139</sup>

Three recent federal cases, two by district courts and one by the Second Circuit, have for the first time suggested that American courts might give recognition to an arbitration award annulled in the situs state.<sup>140</sup> In one of these decisions, *In re Chromalloy Aeroservices (CAS)*, a U.S. district court actually confirmed such an award.<sup>141</sup>

CAS, an American firm, contracted with the Government of Egypt to repair and service helicopters. In December 1991, Egypt terminated the contract. As per their contract, the parties proceeded to arbitration in Egypt. The arbitral panel ruled in favor of CAS, but the Egyptian courts ruled that the award was null. CAS then brought suit in the U.S. to confirm the arbitration award. Sovereign immunity is not a barrier to enforcement, because the Foreign Sovereign Immunities Act specifies that a foreign state is subject to the jurisdiction of American courts in an action to enforce an arbitration award.<sup>142</sup>

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135. See *id.* (noting that *In re Chromalloy Aeroservices (CAS)*, 939 F. Supp. 907 (D.D.C. 1996) “herald[ed] the entry of the United States into the French camp”).

136. See *id.* (“[A]n award that passes muster under France’s domestic law on enforcement of foreign awards must be enforced in France, even if it has been annulled by the courts of the place where it was made.”).

137. Albert Jan van den Berg, *New York Convention of 1958, Consolidated Commentary*, 16 Y.B. COMMERCIAL ARB. 592 (Albert Jan van den Berg, ed., 1994).

138. Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on Chromalloy*, MEALEY’S INT’L ARB. REP., Apr. 1997, available in WL 12 No. MINTARB 20.

139. See ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 355 (1981).

140. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica, S.P.A.*, 77 F. Supp. 2d 405 (S.D.N.Y. 1999); *In re Chromalloy Aeroservices (CAS)*, 939 F. Supp. 907 (D.D.C. 1996).

141. 939 F. Supp. at 914–15.

142. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(6) (Supp. IV 1998).

The court enforced the award under the provisions of the New York Convention. Article 5(1)(e) states "enforcement of an award may be refused . . . only if . . . [several grounds omitted] [t]he award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."<sup>143</sup> Judge Green focused on the word "may" to rule that this provision was merely permissive and offered the court the option of whether to enforce the award.<sup>144</sup> In addition, Article 7(1) states that the Convention "shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."<sup>145</sup>

Judge Green asserted that "if the [New York] Convention did not exist, the Federal Arbitration Act ("FAA") would provide CAS with a legitimate claim to enforcement of this arbitral award."<sup>146</sup> This statement omits a fundamental factor: the issue is not initial confirmation of an arbitration award, *vel non*, but the confirmation of an award that has been denied confirmation by a court with jurisdiction. In the parallel domestic situation, the first award would be accorded *res judicata* effect, without a reconsideration of the underlying award or judicial proceeding. For an international award, CAS would be no better off under pre-Convention law. That law was not the FAA, but the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.<sup>147</sup> Article 2(a) specified that "recognition and enforcement of the award shall be refused if . . . the award has been annulled in the country in which it was made."<sup>148</sup> If the drafters of the New York Convention sought to change this clear rule with the shift from "shall" to "may," this intention was not noted by the drafters or the academic commentators.

Before the Convention, it was "difficult or impossible to enforce an arbitral award outside the state in which the arbitration had taken place."<sup>149</sup> It was precisely the difficulty of obtaining the confirmation of a foreign award that led to the adoption of the New

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143. New York Convention, *supra* note 5, art. 5(1)(e), at 42.

144. *Chromalloy*, 939 F. Supp. at 909 ("Thus the court *may*, at its discretion, decline to enforce the award.").

145. New York Convention, *supra* note 5, art. 7(1), at 42.

146. *Chromalloy*, 939 F. Supp. at 910.

147. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 (1929).

148. *Id.* art. 2(a), 305-06.

149. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 344 (1993).

York Convention. Confirmation in Country B of an award rendered in Country A required an action in the courts of Country A to confirm the award, and then an additional action in the courts of Country B to enforce the Country A judgment (this is the infamous “double exequatur” requirement).<sup>150</sup> Because Egypt’s courts refused to confirm the arbitration award, any action by CAS in an American court would fail under pre-Convention law. In short, even if one accepts Judge Green’s dubious reading of the New York Convention, confirmation of the CAS award was incorrect.

Even if favoritism toward one party may occur in the courts at the situs of the arbitration, that place was chosen by the parties. At least as likely, if not more, is favoritism by the courts in the country where the dissatisfied party seeks review—usually its home country—and that forum was not chosen by the parties. As for the applicable law, the New York Convention contemplates judicial review at the place of the arbitration and the place of enforcement, but restricts review only at the place of enforcement.<sup>151</sup> The reason is apparent: “the greater a nation’s interest in a multinational commercial arbitration, the greater the need to harness that nation’s ability to favor its own national at the award enforcement stage.”<sup>152</sup>

If CAS could not accept arbitration in Egypt, it should have negotiated a different deal. And, if the government of Egypt would not accede on this point, perhaps as a matter of national pride, Chromalloy could accept this provision (and bid higher to reflect the perceived added risk) or decline to compete for the helicopter repair work on offer from the Egyptian Air Force. That is how contract negotiations work: as Rolling Stones fans are well aware, “you can’t always get what you want.”<sup>153</sup>

Judge Green made note of an additional factor: the underlying contract stated that the decision of the arbitral panel “shall be final and binding and cannot be made subject to any appeal or other

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150. Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997).

151. See McConnaughay, *supra* note 75, at 468.

152. *Id.*

153. Perhaps underlying the *Chromalloy* decision is suspicion about the integrity of the courts in Egypt. One observer has pointed out a “disturbing propensity” of Egyptian courts to refuse to enforce arbitral awards in favor of foreign parties against Egyptians or the government “for seemingly arbitrary reasons.” Gary H. Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin*, MEALEY’S INT’L ARB. REP., Sept. 1996, available in WL 11 No. 9 MINTARBR 22. If this concern was an unstated factor in the *Chromalloy* decision, it has not been raised as a relevant factor in subsequent cases.

recourse.”<sup>154</sup> (This sort of boilerplate provision is widely used.) So, in seeking judicial review Egypt “repudiate[d] its solemn promise to abide by the results of the arbitration.”<sup>155</sup> The point of this remark is unclear. Under the court’s analysis of the Convention, the same result would apply even if the contract did not include a limitation on appeal. To the extent that judicial review is available under the New York Convention (or the FAA), no one suggests that such review can be waived by a contract provision.

Not surprisingly, parties (and their counsel) who prevailed in foreign arbitration proceedings, but lost their award in the forum court read *Chromalloy* as an invitation to seek confirmation in U.S. courts. The second such effort resulted in the decision of the Second Circuit in *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*<sup>156</sup> (The third decision was a New York district court, and does not require discussion because it follows *Baker Marine*).<sup>157</sup>

Baker obtained separate arbitration awards against Chevron and Danos in disputes related to oil industry operations in Nigeria. The Federal High Court of Nigeria set aside both awards. Baker sought confirmation in district court, arguing that the Nigerian courts set aside the awards on grounds not recognized under U.S. law. The Second Circuit still declined to confirm the awards.<sup>158</sup>

In response to Baker’s argument that the district court failed to give effect to Article 7 (not depriving party of rights), the Second Circuit responded that there were no rights to enforce. These Nigerian parties opted to arbitrate in Nigeria under Nigerian law, and nothing suggests that the parties intended U.S. law to govern these disputes. Furthermore, “application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments.”<sup>159</sup> As for declining to recognize the Nigerian judgment, the court refused because no adequate reason for doing so was presented by Baker.

Thus far, the Second Circuit decision seems to move toward a rejection of *Chromalloy*, but instead the court distinguished that decision, on two grounds: (a) here, there was not a provision that

154. *Chromalloy*, 939 F. Supp. at 912.

155. *Id.*

156. 191 F.3d 194 (2d Cir. 1999).

157. See *Spier v. Calzaturificio Tecnica*, 71 F. Supp. 2d 279, 284 (S.D.N.Y. 1999) (stating that the *Baker Marine* and *Yusuf Ahmed Alghanim & Sons* “decisions control the case at bar, and require that Spier’s renewed petition [to enforce arbitration] be denied”).

158. See *Baker Marine*, 191 F.3d at 198.

159. See *id.* at 197 n.2.

prohibited appeal of the arbitral award; and (b) the claimant in *Baker Marine*, unlike in *Chromalloy*, was not American.<sup>160</sup>

Neither of these factors is a material distinction. Surely, the parochial consideration of the nationality of the party seeking confirmation is not relevant, let alone determinative. Surely it is inconceivable that the court might have decided the matter differently if Baker had performed the work through an American instead of a Nigerian subsidiary. In the end, the Second Circuit neither endorsed nor rejected the *Chromalloy* approach. Instead, it was satisfied to conclude that recognition of the Nigerian judgment does not conflict with U.S. public policy “in this case.”<sup>161</sup>

In assessing the state of the law, it is important to note that only a single U.S. district court judge has actually enforced an arbitration award that was denied enforcement in the situs country, and that decision was not appealed.<sup>162</sup> However, the support of the Second Circuit for this principle, while refusing enforcement on the facts of the case at bar cannot be discounted. What happens in the next case is an open question. For the moment, practitioners are well advised to include language precluding judicial review.<sup>163</sup>

#### 8. Sky Reefer *Decision by the U.S. Supreme Court*

The United States Supreme Court decided only one international arbitration case during the 1990s, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*.<sup>164</sup> That fact alone would qualify the decision for inclusion in our Top 10 list, but in addition the case has real substantive importance.

In *Sky Reefer*, the Supreme Court upheld a provision in a maritime contract calling for arbitration in Tokyo, Japan. The contract called for the shipment of citrus fruit from Morocco to Massachusetts on a refrigerated ship time-chartered to a Japanese company by its owner, a Panamanian corporation. Thousands of

160. See *id.* at 197 n.3.

161. See *id.*

162. See *Chromalloy*, 939 F. Supp. at 914; see also *supra* notes 141–55 and accompanying text (discussing *Chromalloy*).

163. See Barry H. Garfinkel & John Gardiner, *A Blow to the New York Convention? United States Courts Refuse to Enforce Awards That Have Been Nullified in the Country of Origin*, MEALEY'S INT'L ARB. REP., Feb. 2000, available in WL, 15 No. 2 MINTARBR 34 (stating that “[c]ourts may be more willing to refuse enforcement of a nullified award where the parties have indicated in their arbitration agreement their assent to be bound by foreign procedural rules that resulted in vacatur of the award” and advising practitioners “to draft arbitration agreements that closely mirror the language used successfully in *Chromalloy* which precludes review by the domestic courts of the seat of the arbitration”).

164. 515 U.S. 528 (1995).

boxes of fruit were damaged, with alleged losses in excess of \$1 million. Vimar Seguros, the insurer of the cargo, paid some \$733,000 and thus became a claimant by subrogation.

Unlike an ordinary international commercial contract, where the arbitration provision would clearly be enforced,<sup>165</sup> the *Sky Reefer* facts brought into play the Carriage of Goods by Sea Act ("COGSA"). Section 3(8) of COGSA provides:

Any [provision] in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or *lessening such liability* otherwise than as provided in this chapter, shall be null and void and of no effect.<sup>166</sup>

The Supreme Court ruled that this provision was limited to the lessening of specific liability as provided by the Act but did not address the means of enforcing such liability.<sup>167</sup> Put another way, section 3(8) denies enforcement to substantive provisions that limit carrier liability, but it does not apply to the procedural matter of the forum where liability is determined.

The *Sky Reefer* decision rejected the established law regarding the meaning of section 3(8). The leading case was *Indussa Corp. v. S.S. Ranborg*.<sup>168</sup> Barbed wire was shipped on a Norwegian vessel from Belgium to a California consignee. The *Indussa* plaintiff claimed the goods were damaged in transit, with a resulting loss of \$2,600, and brought a libel in rem against the vessel. The legal issue was whether American courts should defer to a contract provision calling for trial in Norway, or to permit the suit to proceed in the local court.

*Indussa* was a unanimous, *en banc* decision by the Second Circuit Court of Appeals, with the opinion written by Judge Henry Friendly. This federal court, sitting in New York, was (and probably still is) the most important commercial law court in America, and Friendly was the most highly regarded judge on that illustrious court. *En banc* hearings are unusual, and are normally reserved for situations where there is considerable doubt about the

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165. The leading case is *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); see *supra* notes 57-69 and accompanying text.

166. See *Sky Reefer*, 515 U.S. at 534 (quoting 46 U.S.C. App. § 1303(8)) (emphasis added).

167. See *id.* at 541.

168. 377 F.2d 200 (2d Cir. 1967) (*en banc*).

initial panel's (three judges) decision, so dissenting opinions are common.<sup>169</sup> There was no dissent in *Indussa*, however. Subsequent court decisions followed *Indussa*.<sup>170</sup> This position was strongly endorsed by the leading American treatise on admiralty law.<sup>171</sup> In sum, the *Sky Reefer* plaintiffs, who sought to litigate before a U.S. court rather than arbitrate in Tokyo, could hardly have asked for a stronger or better established leading case and subsequent set of consistent precedents.

The Supreme Court dispatched *Indussa* and its progeny as incorrectly decided. The Court ruled instead that lessening liability simply did not encompass "increases in the transaction costs of litigation."<sup>172</sup> As for sending someone to a distant forum, this was easy to do for a fruit wholesaler with a \$1 million claim after earlier decisions enforcing distant forum clauses in international commercial cases,<sup>173</sup> and even in consumer cases.<sup>174</sup>

The Court examined the foreign legal forum only in terms of whether that forum would apply the substantive provisions of COGSA. The shipper argued that Japanese law is less favorable than COGSA to shippers. This argument was dismissed as premature, because the law that the Japanese arbitral tribunal would apply was yet unknown. The only issue before the Court was whether to order arbitration, and any consideration of the merits at this juncture was inappropriate. In the event that the Japanese arbitration tribunal did not apply COGSA, that matter could be raised at the award-enforcement stage. An American court need not honor a foreign judgment that is "repugnant to the public policy of the United States."<sup>175</sup>

169. Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1049 (1999).

170. See, e.g., *Conklin and Garret, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1443-44 (5th Cir. 1987); *Underwriters at Lloyd's of London v. M/V Steir*, 773 F. Supp. 523, 527 (D.P.R. 1991); *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*, 677 F. Supp. 675, 682-84 (D.P.R. 1988).

171. See GRANT GILMORE & CHARLES BLACK, *LAW OF ADMIRALTY* 145-46, n.23 (2d ed. 1975).

172. See *Sky Reefer*, 515 U.S. at 536.

173. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972); see also *Scherk v. Alberto-Culver Corp.*, 417 U.S. 506, 519-20 (1974).

174. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (enforcing boilerplate choice of forum provision in contract of adhesion that required a Washington resident injured on an international cruise to litigate in Florida). The Second Circuit went even further. See *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 11 (2d Cir. 1995) (enforcing choice of forum provision that required New York resident to litigate in Athens, Greece). Even the widely admired Judge Guido Calabresi, although troubled, concurred, stating that "[w]ere we writing on a clean slate, I would want to examine the issue with great care . . . . Since, however, existing case law is as the majority describes it . . . the result reached is appropriate." See *id.*

175. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(2)(d) (1986).

The approach taken by the *Sky Reefer* Court was striking in its rejection of an alternative route to the same result. The Court could have treated *Sky Reefer* specifically as an arbitration matter, thus raising a conflict between two statutes: COGSA and the FAA. This approach would produce the same pro-arbitration result as that reached by the Court, because the FAA supersedes COGSA. Thus, arbitration clauses would be favored over forum selection clauses because the FAA requires enforcement of arbitration agreements, while there is no parallel provision favoring forum selection clauses. Quite apart from reasoning about the matter, there were "legal" bases for adopting this approach.

Already in the *Indussa* decision, Judge Friendly had noted that an arbitration term might call for different treatment than a forum selection term; Friendly specified that the court's ruling did not apply to arbitration clauses in bills of lading, and noted that similar provisions had been "frequently sustained."<sup>176</sup> The FAA was enacted in 1925 and reenacted in 1947, while COGSA was adopted in 1936.<sup>177</sup> To the extent these statutes were inconsistent, "presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947."<sup>178</sup> More immediately, the Court of Appeals decision in *Sky Reefer* relied on the FAA to uphold the arbitration clause.

The *Sky Reefer* decision will have two immediate consequences for the shipping industry and the associated bar, according to a leading member of that bar:

First, cargo interests will be foreclosed from prosecuting any claim for loss or damage to cargo involving less than several hundred thousands of dollars. Second, most U.S. cargo plaintiff and defense attorneys will be looking for other employment.<sup>179</sup>

The reduction of employment for lawyers is a by-product that surely qualifies as a parochial concern. That small claims will not be arbitrated or litigated in a distant forum is not a loss, while larger claims (exemplified by the *Sky Reefer* facts) will still be heard in a formal proceeding if the parties cannot reach a mutually

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176. See *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 204 n.4 (2d Cir. 1967) (*en banc*).

177. *Id.*

178. *Id.*

179. Charles M. Davis, *Sky Reefer: Foreign Arbitration & Litigation Under COGSA*, 8 U.S.F. MAR. L. J. 73, 88 (1995).



agreeable settlement. Now that the relevant law is clearer, more settlements are to be expected.

It should be noted that COGSA litigation commonly is insurer-driven. The parties are sophisticated businesses that purchase insurance as a matter of course, and the real parties in interest often are the insurance carriers. Even Attorney Davis, who dislikes the *Sky Reefer* decision, admitted that the decrease in domestic cargo litigation is likely to result in lower freight rates.<sup>180</sup> Thus, these particular situations can result in win-win situations.

### 9. *Procedural Matters: Multiple Party Proceedings and Discovery*

The U.S. Supreme Court sees arbitration as entirely a creature of contract, with no place for considerations of efficiency.<sup>181</sup> If the result is that part of a dispute is heard by a court (or even by several courts) and part by an arbitrator (or even several by several arbitral tribunals), so be it. The FAA directs that to the extent parties have agreed to arbitrate, courts shall enforce their agreement with dispatch—without regard to considerations of efficiency or fairness.<sup>182</sup> Parties may choose to have their dispute arbitrated under state law even if the matter would otherwise be governed by the FAA.<sup>183</sup>

One consequence of this approach is that consolidation of arbitration proceedings in the United States, or the involuntary joinder of a third party to an arbitration, is all but impossible. In this context, the American courts do not treat international arbitration proceedings more generously than local ones. The state of the law is nicely demonstrated by the decision of the Second Circuit Court of Appeals, in *United Kingdom of Great Britain v. Boeing Co.*<sup>184</sup> The UK purchased helicopters from Boeing, which

180. See *id.* at 89.

181. See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (“To be sure, since arbitration is a creature of contract, a court must always inquire when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute.”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (refusing the “efficiency” argument as a reason for not compelling arbitration, stating “[b]y its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed”).

182. See 9 U.S.C. § 9 (1994) (stating a court “shall” confirm an award unless specific circumstances under the FAA are met). For an example of what a mess this approach can produce, see *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1380–81, 1382 (9th Cir. 1997), which ordered arbitration of post-solvency disputes which the California Insurance Commissioner in his role as liquidator tried to argue were outside the scope of any lay arbitrator’s expertise and more properly addressed in California’s liquidation court.

183. See *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989).

184. 998 F.2d 68 (2d Cir. 1993).

used engines designed and manufactured by Textron. The UK signed contracts with both Boeing and Textron that included identical arbitration provisions—in New York under American Arbitration Association (“AAA”) rules. An “interface” agreement between Boeing and Textron specified their respective rights and duties regarding the UK helicopter project. A military helicopter was damaged during testing, and the UK wanted compensation. The UK sought consolidated arbitration with Boeing and Textron, instead of separate proceedings. The district court ordered consolidation, but the Second Circuit reversed, holding that consolidation is prohibited absent an express agreement among the affected parties.<sup>185</sup> The court distinguished its position from an earlier decision that required a guarantor to participate in an arbitration between the main parties because the contract of guaranty was signed by all three parties.<sup>186</sup>

The arbitration provisions in the UK contracts with Boeing and Textron both called for each party to appoint one arbitrator, with these two selecting the third arbitrator. In ordering consolidation the district court directed the use of a modified selection procedure: each of the three parties would appoint one arbitrator, and these three would then appoint two additional arbitrators.

The inefficiency attendant to two proceedings and the problems associated with inconsistent results were recognized by the court of appeals as “valid concerns,” but the court responded that it lacked authority to consolidate the arbitration proceedings, or to reform the underlying contracts.<sup>187</sup> It is difficult to imagine a stronger set of facts for consolidation of arbitration proceedings than the UK/Boeing/Textron relationship. The Second Circuit ruling against consolidation is therefore an extremely strong precedent.

A similar “hands off” approach by U.S. courts is found in the context of the hotly disputed question of whether an international arbitration panel can obtain an order directing a third party to submit to a deposition from a United States district court. (The request must be made by the arbitration tribunal, not a party to the arbitration proceeding.)

Since the early 1930s, federal courts have been authorized to order depositions to be taken for use in “any judicial proceeding

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185. See *id.* at 74.

186. See *id.* at 70. (distinguishing *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975) and overruling it to the extent it relied on the Federal Rules of Civil Procedure and the “liberal purposes” of the FAA).

187. *Id.* at 74.

pending in any court in a foreign country with which the United States is at peace.”<sup>188</sup> This approach unquestionably excluded arbitration, because it is not a “judicial” proceeding. In 1964, Congress expanded this approach by replacing “judicial” with “foreign or international tribunal.”<sup>189</sup> The intention clearly was to expand the bodies that might obtain the aid of the federal courts, but the text can sensibly be read as limited to governmental tribunals.<sup>190</sup> The legislative history does not discuss international arbitration.

Some observers hoped, and others feared, that American courts would read “tribunals” broadly to encompass private international arbitration proceedings. Both the Second and the Fifth Courts of Appeal have addressed this issue, and both concluded that an arbitration panel is not a “tribunal” within the meaning of 28 U.S.C. [section] 1782.<sup>191</sup> Both of the courts of appeal decisions were based on a consideration of the legislative history of section 1782, and its silence regarding private arbitration.<sup>192</sup> These

188. 28 U.S.C. § 1782 (1958), *quoted in* Nat'l Broad. Co., Inc. v. Bear Stearns & Co., 165 F.3d 184, 189 (2d Cir. 1999) (amended 1964).

189. 28 U.S.C. § 1782 (Supp. V 1999). The Fifth Circuit Court of Appeals in *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881–82 (5th Cir. 1999) has discussed the history of section 1782. It stated:

The decision to substitute the term “tribunal” for “court” was deliberate, evidencing Congress’s intention to expand the discovery provision beyond “conventional courts” to include “foreign administrative and quasi-judicial agenc[ies].” See S. Rep. No. 1580, § 9 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

But the new version of [section] 1782 was drafted to meld its predecessor with other statutes which facilitated discovery for international government-sanctioned tribunals. See, e.g., *National Broad. Co.*, 165 F.3d 184 at 188–90 (discussing combination of [section] 1782 with 22 U.S.C. §§ 270–270g). Neither the report of the Commission that recommended what became the 1964 version of [section] 1782 nor contemporaneous reports of the Commission’s director ever specifically goes beyond these types of proceedings to discuss private commercial arbitrations. There is no contemporaneous evidence that Congress contemplated extending [section] 1782 to the then-novel arena of international arbitration. References in the United States Code to “arbitral tribunals” almost uniformly concern an adjunct of a foreign government or international agency.

*Id.*

190. *Biedermann*, 168 F.3d at 881–82.

191. See *Bear Stearns*, 165 F.3d at 191; *Biedermann*, 168 F.3d at 883.

192. See *Bear Stearns*, 165 F.3d at 190–91; *Biedermann*, 168 F.3d at 881–82. The leading proponent of reading “tribunal” to include international arbitration panels is Professor Hans Smit, but the courts have rejected his revisionist history of section 1782. See Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT’L L. & COM. 1 (1998); Hans Smit, *Assistance Rendered by the United States in Proceedings Before International*

decisions have “effectively sounded the death of [section] 1782 as a tool for private, international arbitration.”<sup>193</sup>

The courts of appeal viewed arbitration as an alternative to the formality of judicial proceedings, and the use of depositions as an aspect of litigation that should be avoided, not encouraged.<sup>194</sup> If parties want to provide for foreign depositions, they should do so in their arbitration agreement. In addition, deposition orders constitute a burden on the courts and on unwilling third parties. In *National Broadcasting Company v. Bear Stearns*,<sup>195</sup> the district court issued subpoenas for production of documents, whose orders then were challenged by several third parties who were the subjects of the subpoenas. The district court rethought the matter after hearing arguments, and then quashed the subpoenas.

If importation of American style discovery into international arbitration proceedings is regarded as a bad thing, the section 1782 decisions are a salutary development that is protective of the arbitration process. This is particularly so because arbitration is a dispute resolution process selected and designed by the parties, and they can make provisions for discovery where that is important or appropriate.

#### 10. *Explosive Growth in The Use of Mediation*

The 1990s saw an explosion in the use of mediation for the settlement of disputes generally, and for international disputes in particular.<sup>196</sup> (We use “mediation” in the broadest sense to include

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*Tribunals*, 62 COLUM. L. REV. 1264 (1962). Both Courts of Appeals in *Bear Stearns* and *Biedermann* acknowledged professor Smit's work. See *Bear Stearns*, 165 F.3d at 190 n.6; *Biedermann*, 167 F.3d 882 n.4–5.

193. Thurston K. Cromwell, *The Role of Federal Courts in Assisting International Arbitration*, 2000 J. DISP. RESOL. 177, 184.

194. *Bear Stearns*, 165 F.3d at 190–91; *Biedermann*, 168 F.3d at 883.

195. 165 F.3d 184.

196. American Arbitration Association, *American Arbitration Association 1999 Annual Report* (visited Feb. 20, 2001) at <http://www.adr.org> (reporting that its international case load increased by 17% in 1999 “with two trends in evidence—an increasing number of cases that have no U.S.-based participants and the size of the average claim is increasing”); George H. Friedman, *American Arbitration Association Initiatives: Looking Toward the New Millennium*, METROPOLITAN CORPORATE COUNSEL, Vol. 6, No. 8, Aug. 1998, at 29 (col. 1); Carmen Collar Fernandez & Jerry Spolter, *International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant?*, 53-AUG DISP. RESOL. J. 62, 68 (1998) (predicting the increasing importance of international mediation because “it is traditional to use conciliation as a mechanism to resolve domestic and labor matters and civil disputes of all types” in Asia and because “40% of the U.S. exports are made to Asian countries”); Julie Barker, *International Mediation—a Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L.J. 1, 21–22 (1996) (predicting the increasing importance of international mediation because “NAFTA's dispute resolution mechanisms encourage consensus and

conciliation and related voluntary dispute settlement approaches.) Unlike arbitration, which serves as an alternative to litigation, mediation serves in tandem with, and as a prelude to, both private and public binding dispute resolution processes.<sup>197</sup>

The hallmark of mediation is commonly considered to be that the process is entirely voluntary, and this is particularly so in the international context. Because international disputes typically are important disputes, whether measured by dollar amounts or the interests at issue, the use of mediation is particularly valuable because the costs are so modest relative to the potential benefits.<sup>198</sup>

American courts will order parties before them, whether the dispute is domestic or international, to mediate prior to having their day in court.<sup>199</sup> Some argue that “court ordered mediation” is an oxymoron, because the parties are not voluntary participants in the process.<sup>200</sup> It may be responded that the process remains voluntary because the determination about whether to settle—and

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collaboration over speed of resolution” and because “mediation is ideally suited to achieve many of these goals”).

197. E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, *ALTERNATIVE DISPUTE RESOLUTION* 816–17 (1996) (describing various ADR processes including mediation/arbitration combinations).

198. See, e.g., *BP Amoco Consortium AIOC Says Gov't Row May Delay Oil Investment*, AFX EUROPEAN FOCUS, Sept. 15, 1999, available in LEXIS, Nexis Library, News File (reporting that a dispute with the government of Azerbaijan may “delay plans for billions of dollars of investment in the country’s off-shore petroleum industry”); *Senator Joins Electric Fray*, OIL DAILY, Sept. 8, 1999, available in LEXIS, Nexis Library, News File (reporting that Sen. Jim Jeffords “was weighing in on a dispute, now before an international arbitration hearing, over a 30-year, multibillion-dollar contract with Hydro-Quebec that a group of Vermont utilities wants to scrap”); *GATT Advises U.S. to Repay Cement Duties: Mexican Firms Wrongly Penalized*, FINANCIAL POST (TORONTO), July 16, 1992, available in LEXIS, Nexis Library, News File (reporting that “[a]n international dispute settlement panel has recommended the U.S. return millions of dollars in anti-dumping duties that it wrongly imposed upon Mexican cement producers”).

199. See Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–52 (Supp. IV 1998) (requiring federal district courts to establish a dispute resolution program and allowing them to create mandatory mediation programs).

200. See, e.g., William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 391 (1999) (“Court-ordered settlement, like court-ordered mediation, is an oxymoron.”); Elliot G. Hicks, *Too Much of a Good Thing?*, W. VA. LAW., Nov. 1998, available in WL 12-NOV WVLAW 4 (commenting that “[n]ow we have state court judges emulating this practice [of requiring attendance of settlement conferences] under the guise of ‘mandatory mediation,’ a serious oxymoron”). Hicks writes that “Mediation is most valuable when it brings willing parties together to work toward settlement. When the parties tell the court mediation might help bring the parties to a settlement, the courts should pave the way for its success.” However, “[o]nce a party wants to move on toward trial, the trial should be scheduled without delay, and without unnecessary conferences designed to pressure unwilling parties to settle.” See also Hon. E. Joseph Bleich, *Meandering on Mediation*, 43 LA. B.J. 149, 149 (1995) (“Certainly the decision to mediate should not be coerced, not even by statute or court order. Although the court may have the authority to order mediation under its inherent powers, this court is quite hesitant to exercise that power. “Mandatory mediation,” patently an oxymoron, should be carefully examined . . .”).

if so, on what terms—remains with the parties. Whatever one's position on this debate, it is a fact that in many parts of America, in both the federal and state courts, participation in mediation (or some similar ADR process) is a condition precedent to a trial.<sup>201</sup> American courts will also order parties to mediate prior to litigation (or arbitration) where their contract so provides.<sup>202</sup> Here the process is more voluntary in the sense that it is based on the agreement of the parties, but participation in the mediation is still mandatory.

International arbitral organizations consider mediation to be part of their mission of promoting the settlement of disputes, and several have taken steps to promote (but not require) mediation or conciliation. The ICC Rules of Conciliation begin with the indisputable observation that “[s]ettlement is a desirable solution for business disputes of an international character.”<sup>203</sup> The AAA standard form arbitration provisions include mediation-arbitration hybrids.<sup>204</sup> The AAA also has adopted rules for mediation of commercial disputes that compliment its arbitration rules.<sup>205</sup> The AAA even offers a financial incentive to try mediation: the administrative fees for mediation are modest, and if the mediation does not fully resolve the dispute the AAA will apply the mediation administrative fee to an ensuing AAA arbitration.<sup>206</sup>

### III. CONCLUSION

The American courts, led by the Supreme Court and the Second Circuit Court of Appeals, have charted a greatly expanded role for arbitration, where called for by contract, in both the domestic and international contexts. At almost every opportunity, the federal courts have strongly favored arbitration, and

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201. See LEO KANOWITZ, *CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION* 83–84 (1985) (citing several examples of legislatively mandated mediation requirements).

202. See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 8:01, at 69–70, n.22 (1994).

203. International Chamber of Commerce (ICC), *Rules of Conciliation*, Preamble (1988), available at [http://www.iccwbo.org/court/english/conciliation/pdf\\_documents/rules/rules\\_conciliation\\_english.pdf](http://www.iccwbo.org/court/english/conciliation/pdf_documents/rules/rules_conciliation_english.pdf). The Preamble further states: “the Rules of Optional Conciliation [were established] in order to facilitate the amicable settlement of such [business] disputes.” *Id.*

204. American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* (1998), available in 1998 WL 1527133.

205. American Arbitration Association, *Mediation Rules for Commercial Financial Disputes*, (last updated Aug. 2000) available at <http://www.adr.org/rules/commercial/AAA210-0900.htm>.

206. See American Arbitration Association, *A Guide to Mediation and Arbitration for Business People*, available at <http://www.adr.org/rules/guides/AAA035-0900.html>; TRACHTE-HUBER & HUBER, *ALTERNATIVE DISPUTE RESOLUTION, STRATEGIES FOR LAW AND BUSINESS* 504 (1996).

encouraged mediation. Earlier federal case law that limited arbitration has been swept away, and state law restrictions on the use of arbitration have been preempted under the commerce clause.

The move from court trials to arbitration eliminates a variety of process protection, notably trial by jury. The distributional consequences might be seen as favoring the powerful over the weak. One law review article put the matter sharply:

Those who have been prejudiced by the Court's handiwork include many American consumers, patients, workers, investors, shopkeepers, shippers, and passengers. Those whose interests have been served include all those engaged in interstate or international commerce deploying their economic power to evade enforcement of their contractual duties or the lash of those state or federal commercial laws that are privately enforced.<sup>207</sup>

Furthermore, it is well known that forum selection and arbitration terms are form terms that usually are not negotiated—and that is true of commercial as well as consumer contracts.

While such critiques are worthy of serious attention, for our purposes they simply serve to highlight the importance and the far-reaching impact of recent developments in American law regarding forum selection and arbitration provisions, particularly in the international context. American contract drafting practices are changing rapidly in response to these developments, and use of arbitration terms in contracts is now highly attractive, at least

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207. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333 (1997); see also Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 331 (1995) (noting that “[c]onsumer advocates are reluctant to wait [for legislative response] until they, government agencies, or legislative committees have documented substantial abuses involving many consumers and financial institutions”); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996) (noting that courts are not “rushing to protect consumers and other little guys from . . . mandatory arbitration clauses”); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1036 (1999) (opining that “[w]hen arbitration is used between persons who are differentially situated in relationship to a self-regulating community, courts . . . should police agreements to arbitrate for unconscionability, impose minimal standards of fairness on the arbitral process, and engage in judicial review of questions of law;” courts should “not automatically compel parties to arbitrate and then rubber stamp the resulting awards”).

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from the perspective of drafting parties. Parties to international contracts can be confident that American courts will enforce agreed upon forum selection and ADR provisions.